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NO. 57115-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DESMOND MODICA,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Judges Michael Trickey and
Christopher Washington

APPELLANT'S REPLY BRIEF

VANESSA M. LEE
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

MR. MODICA DID NOT KNOWINGLY AND UNEQUIVOCALLY WAIVE HIS RIGHT TO COUNSEL.

A valid waiver of the Sixth Amendment right to counsel must be knowing, intelligent, and unequivocal. *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). As discussed in Appellant's Opening Brief, the trial court improperly granted Mr. Modica's initial, equivocal request to represent himself, and then erroneously denied his request for reappointment of counsel.

On July 12, 2005, Judge Trickey, who originally presided over the matter, conducted a colloquy of Mr. Modica 2005 and granted his motion to proceed pro se. CP 11; 3RP 6-12. On July 21, 2005, the information was amended to add a fourth charge of Tampering with a Witness. CP 12-13. Judge Washington then asked Mr. Modica another series of questions regarding his pro se motion, but did not inform him of the seriousness of the new charge. 5RP 2-11.

The State argues that this Court should not consider any facts which occurred after the July 12 hearing.¹ Respondent's Brief

¹ Note that the State itself quotes from later hearings. Respondent's Brief at p. 17.

at p. 12-13. However, such statements, discussed at length in Appellant's Opening Brief, are relevant to show the trial court's failure to inform Mr. Modica about the amended charge and to show the prejudice which resulted from the court's erroneous denial of his request for reappointment.

1. Because he was not informed of the seriousness of the Tampering charge, Mr. Modica's waiver could not have been knowing. A constitutionally valid waiver of the right to counsel must be made with full understanding of the "dangers and disadvantages" of self-representation, and is best assured with an in-depth colloquy by the trial court. *State v. Chavis*, 31 Wn. App. 784, 789-90, 644 P.2d 1202 (1982). An effective colloquy should at a minimum, consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case.

State v. Strodbeck, 46 Wn. App. 26, 28, 728 P.2d 622 (1986), *rev. denied*, 107 Wn.2d 1033 (1987).

The State correctly points out that in *State v. Silva*, 108 Wn. App. 536, 31 P.3d 729 (2001), *State v. Nordstrom*, 89 Wn. App. 737, 950 P.2d 946 (1997), and *State v. Buelna*, 83 Wn. App. 568, 922 P.2d 1371 (1996), the fatal error was the court's failure to

advise the defendant of the seriousness of the charge. Here too, Judge Washington failed to advise Mr. Modica of the seriousness of the new charge. Due process requires a second colloquy satisfying the *Faretta* requirements.

The rules of procedural and substantive law are applied to a pro se defendant just as they are to a defendant represented by counsel. *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987); *State v. Barker*, 35 Wn. App. 388, 392 n.1, 667 P.2d 108 (1983); *State v. Hoff*, 31 Wn. App. 809, 812, 644 P.2d 763, *cert. dismissed*, 459 U.S. 1093 (1982). Relying on a footnote in a civil case, the State argues that a pro se defendant is held to the same standard as a practicing attorney, and that the court was therefore not required to inform Mr. Modica of the potential consequences of the amended information. Respondent's Brief at 14, citing *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033 (1981). This is not the rule in the criminal context.

Here, the question is whether Mr. Modica had proper notice of his new charge and the seriousness of the crime, such that he could make a knowing and unequivocal waiver of his right to counsel. As noted in Appellant's Opening Brief, the information was amended on Thursday, July 21, 2005, and Mr. Modica's trial

began on Monday, July 25, 2005. On that date, the prosecutor still had not provided Mr. Modica with copies of the recordings forming the basis of the charge. 7RP 30. Without the opportunity to research or investigate the new charge, Mr. Modica could not have made a knowing and unequivocal waiver unless Judge Washington ensured that he understood the seriousness of the charge, which he failed to do. 5RP 2-11. Accordingly, the trial court's failure to properly inform Mr. Modica of the new charges rendered his waiver unknowing.

2. Where standby counsel had been appointed and was available, the court erred by denying Mr. Modica's request for reappointment. The Supreme Court has held that a pro se defendant must be provided "adequate law libraries or adequate assistance from persons trained in the law," a requirement which is satisfied by the appointment of standby counsel. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *State v. Dougherty*, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982). A primary purpose of standby counsel is "to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Bebb*, 108 Wn.2d at 525, quoting *Faretta*, at 834, n.15. When Mr. Modica requested reappointment

of counsel, after the swearing-in of the jury but before any other action was taken, that termination of his self-representation did become necessary and warranted.

Since the right to proceed pro se exists to promote the defendant's personal autonomy, rather than to promote the convenience or efficacy of the trial (and often operates to the defendant's detriment), courts generally find that relinquishment of the right to proceed pro se is a far easier matter than waiver of the right to counsel.

Bebb, 108 Wn.2d at 525-26 (pro se defendant waived right to self-representation when he asked that standby counsel be appointed as co-counsel and acquiesced to counsel's representation of him at trial); see also *Smith v. State*, 588 A.2d 305 (1991) (when pro se defendant with standby counsel asked standby counsel to negotiate his guilty plea, he waived his previously asserted right to self-representation); *Dorsey v. State*, 171 Ind. App. 408, 357 N.E.2d 280 (1976) (defendant's request for counsel effectively waived his previous motion to proceed pro se).

Standby counsel was available and ready to represent Mr. Modica, with a reasonable continuance. 9RP 13. At that time the trial had not yet begun; the jury had been sworn in but opening statements had not even been made and no witnesses called. 8RP 5; 9RP 6. The State has not shown and cannot show any harm

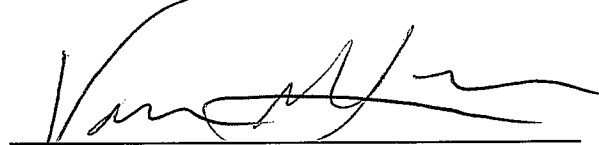
that would have resulted if the court had granted Mr. Modica's request for reappointment. The court could and should have utilized standby counsel to ensure that Mr. Modica's rights were protected – precisely the reason that standby counsel exists in the first place. Instead, the court denied Mr. Modica's request, thereby depriving him of his right to counsel.

B. CONCLUSION

For the reasons presented in his Opening Brief and above, Mr. Modica respectfully requests that this Court reverse his convictions.

DATED this 28th day of August, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa Lee', is written over a horizontal line.

VANESSA LEE (WSBA 37611)
Washington Appellate Project (91052)
Attorneys for Appellant

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CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 28TH DAY OF AUGUST, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

☒

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☐

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2006.

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Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711